Nos. 85-2003 and 85-2150

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

HENRY E. INGRAM, JR., PETITIONER

v.

UNITED STATES OF AMERICA

CLIFFORD BRANTLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' conspiracy convictions under the Hobbs Act, 18 U.S.C. 1951, were correctly sustained where petitioners' purported victims were actually federal agents and the object of the conspiracy was thus impossible to achieve.

2. Whether the Hobbs Act covers only extortionate conduct that adversely affects interstate commerce.

3. Whether the evidence was sufficient to support petitioner Ingram's conspiracy conviction under the Hobbs Act.

4. Whether the selection of the jury from a districtwide pool violated petitioners' rights under the Sixth Amendment or the Jury Selection and Service Act, 28 U.S.C. 1861 *et seq.*

5. Whether the district court erred by failing to instruct the jury on the law of entrapment.

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OPINION BELOW

The opinion of the court of appeals (85-2003 Pet. App. 39-57)[1] is reported at 777 F.2d 159.

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[1]Unless noted otherwise, all citations to "Pet. App." will refer to the petition filed in No. 85-2003.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1985, and a petition for rehearing was denied on April 2, 1986 (Pet. App. 58-59). The petitions for a writ of certiorari were both filed on June 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioners were convicted on one count of extortion and one count of conspiring to commit extortion, both in violation of the Hobbs Act, 18 U.S.C. 1951. Petitioner Ingram was sentenced to concurrent four-year terms of imprisonment on the two counts. Petitioner Brantley was sentenced to concurrent terms of imprisonment of five and seven years, respectively, on the two counts, and a $2200 fine. The court of appeals reversed petitioners' convictions on the substantive extortion count, but affirmed their convictions on the conspiracy count (Pet. App. 39-57).

1. The evidence at trial, as summarized in the opinion of the court of appeals (Pet. App. 41-44), showed that FBI Agent Theodore Domine was dispatched to South Carolina from the FBI's Cleveland office to conduct an undercover investigation of reported corruption on Hilton Head Island. Agent Domine posed as a gambler who was interested in opening and operating a casino, for which he needed the "protection" of local law enforcement officials. Petitioner Ingram, a local owner of gambling devices, suggested that the agent consider locating the gambling operation in a vacant restaurant in Hardeeville, a small town in Jasper County, South Carolina. Ingram said his friend, petitioner Brantley, was the sheriff of Jasper County and that Brantley would protect the gambling operation if he were paid $500 per month. Ingram also proposed that the agent give Brantley $200 at their first meeting as a gesture of good faith (*id.* at 42).

Ingram and Agent Domine subsequently visited Brantley at his office. Domine explained that he intended to rent the vacant restaurant in Hardeeville and, once a month, to invite persons from Cleveland, New York, and Chicago to gamble there at high stakes. Brantley approved the proposal but insisted that it not involve any local persons. At the conclusion of the meeting, Ingram handed Sheriff Brantley $200 that Agent Domine had given him for that purpose (Pet. App. 42-43).

After Agent Domine rented the vacant restaurant, he arranged for gaming tables and other gambling equipment to be delivered from the FBI training academy in Virginia. He also stocked a bar with liquor furnished by the FBI. Thereafter, six to eight FBI agents, posing as gamblers, assembled at the club once each month for the next four months. They gambled and purchased drinks with money supplied by the FBI. In addition, once each month Agent Domine met with Sheriff Brantley, reported that the casino was operating as planned, and paid the Sheriff $500 (Pet. App. 43-44).

2. Petitioners were convicted of both extortion and conspiracy to commit extortion. On appeal, the court of appeals reversed petitioners' convictions on the substantive count but affirmed their convictions for conspiracy.

The court of appeals reversed on the substantive count because it found that petitioners' acts of extortion had not actually affected interstate commerce (Pet. App. 45). Neither the liquor nor the gambling devices that the FBI transported to South Carolina were the subjects of commercial transactions, the court held. The prosecution had therefore failed to show that petitioners had obstructed, delayed, or affected commerce, within the meaning of the Hobbs Act, 18 U.S.C. 1951. Pet. App. 44-49. Relying on *United States* v. *Archer*, 486 F.2d 670 (2d Cir. 1973),

moreover, the appellate court held that "federal agents may not manufacture jurisdiction by contrived or pretensive means" (Pet. App. 49). Thus, because "[i]t was wholly unnecessary [to the extortion scheme] for the FBI to move gambling equipment from Virginia to South Carolina, or to have its agents pretend to gamble and to purchase whiskey," the court of appeals found no effect on interstate commerce and thus no "commercial predicate for federal jurisdiction" (*id.* at 50).

With regard to the conspiracy convictions, the court of appeals reached a different conclusion. As with other conspiracy statutes, the court held, "a conviction of conspiring to obstruct commerce in violation of the Hobbs Act may be founded upon proof of an agreement to engage in conduct which would violate the statute" (Pet. App. 51). Thus, even though the object of the conspiracy could not be attained and the conspiracy therefore could have had no actual effect on interstate commerce, petitioners could still be guilty of conspiracy, as long as the unlawful agreement contemplated an effect on interstate commerce. In this case, the court of appeals noted, petitioners anticipated that the "[p]atronage of non-residents was to be sought, while local people were to be excluded from participation" in the gambling enterprise (*id.* at 55). Petitioners' agreement therefore contemplated a substantial effect upon interstate commerce. While petitioners may have been "the victims of pretense in the description of the project," the court concluded that that did not "sanitize their * * * willing participation in a conspiracy to violate the Hobbs Act" (*id.* at 56).[2]

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[2]The court of appeals also rejected the assertion that the district court should have instructed the jury on the law of entrapment, concluding that "[t]here was insufficient evidence of entrapment to warrant an instruction on the subject" (Pet. App. 56).

ARGUMENT

1. The court of appeals correctly upheld petitioners' Hobbs Act conspiracy convictions. Moreover, the court's decision is not in conflict with the decisions of this Court or any other circuit. Accordingly, further review by this Court is unwarranted.

The involvement of federal agents prevented petitioners from realizing the object of their conspiracy. Nevertheless, the court of appeals upheld petitioners' conspiracy convictions because their conspiratorial agreement contemplated conduct that "would have had more than an adequate effect upon commerce" (Pet. App. 56). Every circuit court that has considered this issue has reached the same conclusion: defendents may be convicted of violating the Hobbs Act even where, because of the involvement of federal agents, it is impossible for the defendants to carry out the object of the conspiracy. See *United States* v. *Holmes*, 767 F.2d 820 (11th Cir. 1985); *United States* v. *Brooklier*, 685 F.2d 1208, 1216-1217 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983); *United States* v. *Jannotti*, 673 F.2d 578, 590-594 (3d Cir.), cert. denied, 457 U.S. 1106 (1982); see also *United States* v. *Rindone*, 631 F.2d 491 (7th Cir. 1980); *United States* v. *Frazier*, 560 F.2d 884 (8th Cir. 1977), cert. denied, 435 U.S. 968 (1978).

Petitioners contend, in essence, that a conspiracy to violate the Hobbs Act is no different from a substantive violation of that Act. If the substantive crime cannot be carried out because of the involvement of undercover agents, they argue, the government may not prosecute the unlawful agreement to carry out that substantive crime. But this claim overlooks the fact that the conspiracy and substantive provisions of the Hobbs Act constitute two separate crimes "composed of differing components" (*Callanan* v. *United States*, 364 U.S. 587, 597 (1961)). The distinction between a substantive offense and a conspiracy to commit it results in

many instances in which particular conduct can be prosecuted under one provision but not the other. See *Jannotti*, 673 F.2d at 593; *United States* v. *Rose*, 590 F.2d 232 (7th Cir. 1978), cert. denied, 442 U.S. 929 (1979) (conspiracy conviction affirmed despite the fact that involvement of FBI agents prevented theft of goods from taking place).

This Court made the same point in a closely analogous setting. In *Osborn* v. *United States*, 385 U.S. 323 (1966), an attorney sought to bribe a member of a jury panel in a prospective criminal case. Unbeknownst to the attorney, the person through whom he sought to pass the bribe was cooperating with federal agents. After his conviction, the attorney argued, as petitioners do here, that because of the involvement of federal agents the actual bribe scheme was "impossible of accomplishment" (385 U.S. at 332). Noting that the attorney had been charged simply with "endeavoring" to effect the bribe, this Court rejected the impossibility defense. Because the statute reached all "endeavors" to corrupt a juror, the Court found that it was unnecessary for the government to prove that there was some risk that the juror would actually be corrupted. It was enough that the defendant had the intent to commit the offense and took steps to realize this unlawful objective. *Id.* at 333. The same analysis applies to a prosecution for conspiracy; as long as the conspirators share an unlawful purpose and enter into an agreement to achieve that purpose, the offense is complete, regardless of whether there is any realistic likelihood that the object of the conspiracy will ever be attained.[3]

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[3]Petitioner nevertheless asserts (Pet. 20-21, 23) that the decision of the court of appeals sustaining his conspiracy conviction conflicts with the holding in *United States* v. *Mattson*, 671 F.2d 1020 (7th Cir. 1982). In *Mattson*, the Seventh Circuit overturned a Hobbs Act conspiracy conviction because "[t]he victim in th[at] case was an individual who had no connection with interstate commerce at all * * *" (671 F.2d at 1025). Mattson could not be charged with conspiring to violate the Hobbs Act because the bribe he accepted neither affected nor was

2. Petitioner Brantley, while conceding that "interstate commerce would have been affected by the proposed gambling establishment," insists that the venture would not have adversely affected commerce (85-2150 Pet. 12). Because in his view "the federal government has no interest in prosecuting a crime that has, either actually or potentially, only a favorable impact on interstate commerce" (*ibid.*), Brantley asserts that petitioners' conspiracy may not be prosecuted under the Hobbs Act.

As petitioner frankly acknowledges, this argument essentially asks the Court to "engraft[] the word 'adversely' into the meaning of the Hobbs Act" (*ibid.*). There is neither precedent nor warrant for restricting the scope of the Act in that fashion. The Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce" (*Stirone* v. *United States*, 361 U.S. 212, 215 (1960)). This Court has expressly refused to limit the broad reach of the Hobbs Act by reading into it qualifying language that simply is not there. In *United States* v. *Culbert*, 435 U.S. 371 (1978), the Court rejected the contention that conduct otherwise satisfying the elements of a Hobbs Act violation must also constitute "racketeering" in order to fall within the Act. The Court found that the statutory language did "not lend [itself] to restrictive interpretation" (435 U.S. at 373). Rather, the language "sweeps within it all persons who have 'in any way or degree * * * affect[ed] commerce * * * by robbery or extortion' " (*ibid.*, quoting 18 U.S.C. 1951(a)).

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meant to affect interstate commerce. By contrast, petitioners' agreement to extort protection money from Agent Domine contemplated that Domine's illegal casino would be patronized exclusively by gamblers from outside South Carolina. An effect on interstate commerce was therefore an integral part of the agreement in this case, but was no part at all of the agreement in *Mattson*. There is accordingly no conflict between the decision of the Fourth Circuit in this case and that of the Seventh Circuit in *Mattson*.

The Hobbs Act, on its face, covers all acts of extortion that "affect commerce." There is no textual basis on which to restrict the statutory language as Brantley urges. Moreover, the decision of the court of appeals is consistent with the decision in every other case that has addressed the issue. See, *e.g.*, *United States* v. *Mattson*, 671 F.2d 1020, 1024 (7th Cir. 1982) ("[e]ven a beneficial effect on interstate commerce, *e.g.*, facilitating the flow of building materials across state lines, is within the prohibition of the statute"); *Jannotti*, 673 F.2d at 590; *United States* v. *Kuta*, 518 F.2d 947 (7th Cir.), cert. denied, 423 U.S. 1014 (1975); *United States* v. *Staszcuk*, 517 F.2d 53, 58 (7th Cir.) (en banc), cert. denied, 423 U.S. 837 (1975). Further review is unwarranted.

3. Petitioner Ingram asserts (Pet. 24-28) that the evidence supporting his conspiracy conviction was insufficient because the government failed to show that the conspiracy had "a probable effect on interstate commerce" (*id.* at 27). This claim, however, simply restates in another guise petitioner's initial contention that there cannot be a Hobbs Act conspiracy where the object of the scheme is incapable of being realized. As we noted above (see pages 5-7, *supra*), the conspiracy here plainly *contemplated* that there would be an effect on interstate commerce. The court of appeals so found, and its conclusion, based on this record, does not deserve further consideration.[4]

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[4]This Court's decision in *United States* v. *Feola*, 420 U.S. 671 (1975), from which petitioner quotes extensively (Pet. 25-27), is not to the contrary. There, the Court held that one may be guilty of conspiracy to assault a federal officer, in violation of 18 U.S.C. 371, without specifically knowing that the victim was a federal officer. In the course of its decision, the Court noted that while the defendant need not know the federal status of his victim, the government must nevertheless show that the defendant knew enough about his intended victim so that it may be fairly said that the "unfulfilled agreement to assault, * * * standing alone, constituted a sufficient threat to the safety of a federal officer so

4. Petitioner Ingram contends (Pet. 28-31) that the selection of his jury from the entire district of South Carolina, rather than from just the Charleston division, denied him his rights under the Sixth Amendment and the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*

The Jury Selection and Service Act guarantees the random selection of juries "from a fair cross section of the community in the district or division wherein the court convenes" (28 U.S.C. 1861). Petitioner's jury was selected from a pool comprised of persons from the entire district. The jury selection system used in this case therefore complied with the plain terms of the Act.

Petitioner is equally mistaken in contending that the jury-selection process failed to provide a "fair cross section of the community" within the meaning of the Sixth Amendment. Petitioner does not dispute that his jury was selected from a "fair cross section" of the district. Nor does he assert that the trial court's decision to draw the jury pool from the entire district—rather than just the Charleston division—was somehow intended to deprive him of his rights. Petitioner simply contends that by drawing the jury from a statewide rather than a local pool, the trial judge caused "a substantial reduction of non-white qualified jurors" (Pet. 30). Even if true, this claim does not make out a violation of the Sixth Amendment. See *Savage* v. *United States*, 547 F.2d 212, 215-216 (3d Cir. 1976), cert. denied,

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as to give rise to federal jurisdiction" (420 U.S. at 695). Petitioner relies on this language to support his claim that there was insufficient evidence that the conspiracy in this case constituted enough of a threat to interstate commerce to provide federal jurisdiction. But petitioner misconstrues the quoted language from *Feola*. The Court simply stated that a conspiratorial agreement must contemplate conduct which, if realized, would satisfy the jurisdictional threshold; the court of appeals in this case concluded that this conspiracy met that test, and its decision on that point is amply supported by the record.

430 U.S. 958 (1977). By its terms, the Sixth Amendment requires only that the jury be selected from "the State and district wherein the crime shall have been committed." While the Sixth Amendment has been held to be satisfied by the selection of juries from only a single division within a district, see *Ruthenberg* v. *United States*, 245 U.S. 480, 482 (1918), there is obviously nothing wrong with a jury-selection system that complies with the strict terms of the Amendment by providing for juries to be selected from the entire district.

5. Finally, petitioner Ingram renews his claim (Pet. 32-36) that the district court erred by failing to instruct the jury on the law of entrapment.

In *United States* v. *Russell*, 411 U.S. 423 (1973), this Court observed that "entrapment is a relatively limited defense" and is available only to those defendants who have "committed all the elements of a proscribed offense, but [were] induced to commit them by the Government" (411 U.S. at 435). The courts uniformly hold that before a defendant is entitled to an entrapment instruction, he must first produce some evidence that the government induced him to commit the offense. See, *e.g.*, *United States* v. *Busby*, 780 F.2d 804, 806 (9th Cir. 1986); *United States* v. *Nations*, 764 F.2d 1073, 1079-1080 (5th Cir. 1985); *United States* v. *Rodgers*, 755 F.2d 533, 550-551 (7th Cir. 1985), cert. denied, No. 84-6500 (July 1, 1985); *United States* v. *Kakley*, 741 F.2d 1, 3 (1st Cir. 1984), cert. denied, No. 84-5341 (Oct. 9, 1984); *United States* v. *Bagnell*, 679 F.2d 826, 835 (11th Cir. 1982), cert. denied, 460 U.S. 1047 (1983). Cf. *Lopez* v. *United States*, 373 U.S. 427, 434-435 (1963) ("before the issue of entrapment can fairly be said to have been presented in a criminal prosecution there must have been at least some showing of the kind of conduct by government agents which may well have induced the accused to commit the crime charged"). Reviewing the record in this case, the court of appeals concluded (Pet.

App. 56) that Ingram did not make a factual showing sufficient to merit an entrapment instruction.

While admitting that he had twice accepted cash from Agent Domine on behalf of Sheriff Brantley (4 Tr. 195, 204), petitioner Ingram never claimed that he was induced to do so. Rather, he repeatedly denied that he had joined a scheme to protect an illegal gambling operation, and he insisted that there was no connection between his acceptance of cash from Agent Domine and the operation of the casino (*id.* at 193-195, 204-205, 221-223, 231, 234, 239, 241). Ingram even professed surprise that the agent had given Brantley money (*id.* at 200). In short, as the court of appeals concluded, petitioner failed to adduce evidence sufficient to require an entrapment instruction to the jury.[5] The court's analysis of the record and its fact-bound conclusion warrant no further review by this Court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[5]Ingram cites only one part of the record as having sufficiently raised an entrapment defense—that in his own testimony at trial he had "explain[ed] that he did not understand why those actions [he had taken] were against the law" (Pet. 34). Plainly, that disclaimer has nothing to do with any alleged inducement by the government.